Statement by the Center for Democracy and Technology

before the

House Permanent Select Committee on Intelligence

Analysis of the Wilson-Hoekstra-Sensenbrenner Bill

July 27, 2006

Representative Wilson has introduced legislation, cosponsored by HPSCI Chairman Hoekstra and Judiciary Chairman Sensenbrenner, that would make significant changes to the Foreign Intelligence Surveillance Act, mainly by expanding the circumstances under which the government can conduct warrantless electronic surveillance in the United States, including surveillance of the communications of US citizens. Chairman Specter has added similar language to his bill, as a new Section 9, so in this analysis we also reference the Specter legislation. (The Wilson bill, unlike the Specter bill, does not repeal FISA's exclusivity provision.)

1. HOW THE REVISED DEFINITIONS EXPAND WARRANTLESS SURVEILLANCE

"Agent of a foreign power:" Both bills would expand the definition of an agent of a foreign power to include a non-US person who "otherwise possesses or is reasonably expected to transmit or receive foreign intelligence information within the United States." It is unclear what is the purpose of this change, but since the FISA definition of "person" includes corporations, this amendment could expand FISA to permit surveillance (sometimes with a court order, sometimes without) of communications to, from or through every foreign-owned bank, airline, or communications company and any other foreign corporation in the US if it has information that is foreign intelligence (such as financial transactions, travel arrangements, or communications).

"Electronic surveillance:" Both bills would amend the crucial definition of "electronic surveillance" in FISA, in ways that would allow much more warrantless surveillance. The following is the text of FISA as it would be amended by the bills. (Deleted text is crossed out and new text is in italics. The amendments are largely identical. Where Rep. Wilson's bill would differ from Chairman Specter's, the variations are indicated by footnotes). The Center for National Security Studies produced the following "redline:"

"(f) 'Electronic surveillance' means—

"(1) the ~~acquisition by~~ *installation or use of* an electronic, mechanical, or other[1] surveillance device ~~of the contents of any wire or radio communications sent by or~~

[1] Wilson's bill would delete the phrase "electronic, mechanical, or other."

~~intended to be received by~~ *for the intentional collection of information concerning*[2] a particular known[3] ~~United States~~ person who is *reasonably believed to be* in the United States ~~if the contents are acquired~~ by intentionally targeting that ~~United States~~ person under circumstances in which that person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes; or

~~(2) the acquisition by an electronic, mechanical, or other surveillance device of the contents of any wire communication to or from a person in the United States, without the consent of any party thereto, if such acquisition occurs in the United States, but does not include the acquisition of those communications of computer trespassers that would be permissible under section 2511(2)(i) of title 18;~~

~~(3) the intentional acquisition by an electronic, mechanical, or other surveillance device of the contents of any radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States; or~~

~~(4) the installation or use of an electronic, mechanical, or other surveillance device in the United States for monitoring to acquire information, other than from a wire or radio communication, under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes.~~

(2) the intentional acquisition of the contents of any communication[4] *under circumstances in which a person has a reasonable expectation of privacy and a warrant would be required for law enforcement purposes, and if both the sender and all intended recipients are located within the United States."*

The net result of these changes is as follows: Currently, FISA requires a court order to intercept wire communications into or out of the US, many of which involve US citizens. Under the proposed new definition, wire communications to or from the US could be intercepted using the vacuum cleaner of the NSA, without a warrant, so long as the government is not targeting a known person in the US. If the government were targeting someone who is overseas, they would be able to intercept communications between that person and citizens in the US without a warrant. And if the government is engaged in broad, unfocused collection, it could intercept all international communications without a warrant, even those originated by citizens and even those involving citizens on both ends. There are likely other consequences of the specific language used, but it is impossible to tell what they are by merely reading the words themselves.

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[2] Wilson's bill would use the phrase "relating to" rather than "concerning."

[3] Wilson's bill would delete the phrase "particular known."

[4] Wilson's bill would insert the phrase ", without the consent of a party to the communications," after "any communication."

"Minimization procedures:" Under current law, if the government, acting without a warrant under Section 102(a) of FISA, obtains the communications of a US person, those communications cannot be disclosed, disseminated or used, and the government must destroy them within 72 hours unless the Attorney General obtains a court order or determines that the information indicates a threat of death or serious physical harm. Both bills would permit unrestricted retention and use of the communications of US citizens obtained without a warrant.

This change is especially important in light of the changes made to Section 102(a), which include new authority for warrantless surveillance of a wide range of domestic and international calls involving US citizens. Current law requires a warrant if there is a substantial likelihood that surveillance inside the US will acquire the contents of communications of US persons. Both the Wilson bill and the Specter bill repeal that limitation and also eliminate the requirement in Section 102(a) that any warrantless wiretapping be limited to means of communications "used exclusively between or among foreign powers."

"Surveillance device:" The Wilson bill includes a new definition for "surveillance device," a term that is not currently defined in FISA. It defines "surveillance device" as a "device that allows surveillance by the Federal Government, but excludes any device that extracts or analyzes information from data that has already been acquired by the Federal Government by lawful means." This appears to exclude data mining activities from coverage under the statute, and, given the breadth of warrantless surveillance permitted under the Wilson bill, amounts to a Total Information Act program, in which the government collects large amounts of data without court order, keeps it forever, and analyzes it at any time without court approval. The Specter bill does not include this definition.

"Attorney General:" The Specter bill redefines "Attorney General" to include "any person or persons" designated by the Attorney General, which means any janitor can be designated by the Attorney General to exercise his powers under FISA. The Wilson bill does not include this provision.

2. HOW THE AMENDMENTS TO FISA SECTION 102 EXPAND WARRANTLESS SURVEILLANCE

Both bills would significantly expand Section 102(a) of FISA, 50 USC § 1802(a), which allows warrantless surveillance inside the US under certain conditions for up to a year. While the two bills are somewhat different, both would vastly expand the warrantless surveillance of US citizens.

- While the Specter bill expands warrantless surveillance of all communications of all foreign powers and non-US person agents of foreign powers, the Wilson bill would expand warrantless surveillance of the communications of only certain foreign powers (i.e., those that are foreign governments, factions of foreign

nations or entities controlled by foreign governments) and all non-US person agents of foreign powers (AFPs). Both bills would allow warrantless surveillance whenever a citizen calls the Israeli embassy or Olympic Airlines.

- Both bills would permit warrantless surveillance of both international and domestic calls.

- Both bills would permit the warrantless acquisition of "technical intelligence," which is not a defined term.

- Both bills would permit the acquisition of communications to which a US person is a party. Currently, warrantless surveillance under1802 is permitted only if the surveillance is not likely to acquire communications to which a US person is a party.

- Both bills would eliminate the requirement in 1802(a) that the warrantless electronic surveillance be targeted at means of communications used *exclusively* "between or among" foreign powers and non-US person AFPs.

Thus, the government could collect, without a warrant, any communication between any US person and a foreign power or agent of a foreign power, so long as the government was directing its activity at the foreign power or AFP. Since, as stated above, both bills delete the minimization language prohibiting the use, dissemination, disclosure or retention of US person communications intercepted without a court order, these amendments would allow the interception, indefinite storage and essentially unlimited use of the contents of communications of US persons without a warrant.

3. REDUCING JUDICIAL OVERSIGHT BY REDUCING THE DETAIL IN FISA APPLICATIONS

Both bills would delete some of the information the government is currently required to include in its applications to the FISA court—

- A detailed description of the nature of the information sought and the type of communications or activities to be subject to surveillance;
- A statement of the means by which the surveillance will be effected and a statement whether physical entry is required to effect the surveillance (The Wilson bill would retain the statement about physical entry.);
- Information about previous applications submitted relating to this target; and
- Information on minimization procedures and the number of surveillance devices to be used, if more than one device is expected to be used.

All of this information is useful to the court in determining if the surveillance is reasonable and if the government's minimization procedures are tailored to the type of

surveillance for which approval is sought. Without this information, it will be hard for the court to issue an order specifying the scope of permitted surveillance.

4. REDUCING POLITICAL ACCOUNTABILITY

FISA currently requires that applications require a certification by the President's National Security Advisor or by a Senate confirmed official. Both bills eliminate that and allow the President to designate anyone to make the certification.

Under the Wilson bill, the authority to issue emergency surveillance orders would remain with the Attorney General. The Specter bill, however, would place that authority in the hands of anyone authorized by the President.

5. EXPANDING EMERGENCY TAPS

The Wilson bill changes the emergency exception by allowing surveillance in an emergency to last for 120 hours (5 days) before an application is made to the FISA court. The current time is 72 hours (up from 24 pre-PATRIOT). The Specter bill would give the government **7 days** to apply for a FISA order.

6. EXPANDING NON-EMERGENCY TAPS

The Specter bill would allow the FISA court to issue regular FISA orders under Section 105, including for surveillance of US persons, for one year in duration, up from 90 days under current law.

7. AUTHORIZING WARRANTLESS SURVEILLANCE AFTER AN ARMED ATTACK AND AFTER TERRORIST ATTACKS

The Wilson bill would authorize warrantless electronic surveillance and warrantless physical searches for 2 months after an "armed attack against the territory of the United States." There is no definition of "armed attack against the territory of the United States" and nothing to indicate that the attack must be by a foreign terrorist group. Are US embassies "territory of the United States?" Was the July 4, 2002 attack at the El Al check-in counter at Los Angeles airport, in which a solo gunman killed three people, an armed attack against the territory of the US? How about the attacks of the Washington DC sniper?

The Wilson bill also adds a detailed new section – "Authorization Following a Terrorist Attack Upon the United States" – which would allow warrantless electronic surveillance for 45 days after "a terrorist attack against the United States" as long as the President (1) notifies the congressional intelligence committees and (2) a FISA judge that the US has been "the subject of a terrorist attack" and "identifies the terrorist organizations or affiliates of terrorist organizations believed to be responsible for the terrorist attack."

This warrantless electronic surveillance can continue indefinitely as long as the President submits a certification every 45 days. Warrantless electronic surveillance of US persons under this section is limited to **90 days** unless the president submits a certification to the congressional intelligence committees that (1) continued surveillance is vital to US national security, (2) describes the circumstances preventing the Attorney General from obtaining an order, (3) describes the reasons to believe that the US person is affiliated with or communicating with the terrorist organization or affiliate, and (4) describes the foreign intelligence information derived.

- The President or an official he designates may conduct warrantless electronic surveillance of a person under this "Terrorist Attack" section only when the President or such official determines that (1) there is a "reasonable belief that such person is communicating with a terrorist organization or an affiliate of a terrorist organization that is reasonably believed to be responsible for the terrorist attack;" (2) "the information obtained…may be foreign intelligence information; and …." [*The section ends there with no number (3).*]

- Information obtained under this section can be used to obtain a subsequent court order authorizing surveillance.

- The President is required to report to the intelligence committees after 2 weeks and then at 30-day intervals. The report must include (1) a description of each target and (2) the basis for believing that each target is in communication with a terrorist organization or an affiliate of a terrorist organization.

8. OTHER PROVISIONS

The Wilson bill would amend Section 1805(i), which provides immunity to electronic communications services for cooperation with the government, to provide immunity if the entity (1) complied with requests for cooperation pursuant to a court order or a request for emergency assistance (for electronic surveillance or physical searches) or (2) "in response to a certification by the Attorney General or [his designee] that … [the surveillance] does not constitute electronic surveillance."

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